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No. 90-242

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES RAY DABNEY, RONALD EUGENE BLACK, KENTON THOMAS HALL, JEFFREY DEAN GREGG, ROBERT LEWIS GILCHRIST, BOBBY O'NEAL HOLDER, DONALD S. JAMISON AND EDWARD HIGGINS, Petitioners,

v.

THE STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When an offense of driving under the influence is committed after the effective date of a new driving under the influence recidivist statute, may the punishment be enhanced by prior offenses committed when the recidivist statute had a five-year reachback period, and the new recidivist statute has an increased ten-year reachback period?

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The Respondent State of South Carolina respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of South Carolina's opinion in this case. That opinion is State v. Dabney, et al., ____S.C.____, 391 S.E.2d 563 (1990) and is reproduced in Respondent's Appendix. Respondent notes that Petitioners

incorporated typographical errors in the Opinion found in Petitioners' Appendix A that may affect the clarity of the Opinion.

STATEMENT OF THE CASE

S.C. Code Ann. § 56-5-2940 (Supp. 1989) punishes recidivist driving under the influence offenders on the basis of the number of their prior offenses. The statute codifies Act No. 532 of 1988 which provides that effective January 1, 1989 "prior offenses" are "those offenses which occurred within a period of ten years including and immediately preceding the date of the last offense...." Previously, Act No. 76 of 1981, effective May 21, 1981, had restricted "prior offenses" to only five years. Neither act made any provision for the disposition or punishment of future, uncommitted offenses.

For driving under the influence offenses committed on, or after, January 1, 1989, Petitioners were punished according to the number of prior offenses within a period of ten years. The new law was applied solely to punish offenses of driving under

the influence that occurred after its enactment and effective date of January 1, 1989. No penalty for any earlier offense was increased. Only an offense subsequent to the effective date of the new law was subject to increased punishment, and there was no violation of the ex post facto prohibition.

SUMMARY OF ARGUMENT

The new driving under the influence law became effective January 1, 1989, lengthening the period -- from five to ten years -- within which prior offenses of driving under the influence were statutorily available to count against an offender for purposes of enhancing punishment for a new offense. Petitioners were sentenced for offenses of driving under the influence committed after the effective date of the amended statute. The amended recidivist statute lengthened the period of time previous convictions can count to increase the punishment for a subsequent offense. The statute punishes only new crimes and is not ex post facto since it only allows convictions before its amendment to be used to determine the penalty for a new offense.

REASON WHY THE PETITION SHOULD BE DENIED

The ex post facto clause allows enhanced punishment for a new, repeated offense when the prior offense(s) took place before the enhancement provision was in effect.

S.C. Code Ann. § 56-5-2940 (Supp. 1989) sets greater penalties for recidivist driving under the influence offenders on the basis of the number of their prior offenses. Act No. 532 of 1988 provides that effective January 1, 1989 "prior offenses" are "those offenses which occurred within a period of ten years including and immediately preceding the date of the last offense...." Previously, Act No. 76 of 1981, effective May 21, 1981, had restricted "prior offenses" to only five years.

In light of the constitutional prohibition of ex post facto laws, Petitioners contend that an offense committed when prior offenses were calculated within a five-year time span is only viable as a prior offense for a five-

year period and cannot presently be used as a prior offense -- even though pursuant to § 56-5-2940 and Act No. 532 of 1988, the offense "occurred within a period of ten years including and immediately preceding the date of the last offense...."

Respondent strongly disagrees with Petitioners' assertion of error. The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. ...[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981). It is not a violation of the ex post facto

prohibition for a defendant to be deprived of even a "substantial protection" such as that afforded by the reformation of an improper verdict. The ex post facto clause of Article I, § 10 proscribes laws that (1) punish as a crime an act previously done that was innocent when done; (2) make punishment more burdensome after the commission of a crime; and (3) deprive an accused of a defense available at the time when the act was committed. Collins v. Youngblood, Op. No. 89-742 (U.S. filed June 21, 1990).

South Carolina Constitution Article I, § 4 also forbids ex post facto legislation. The new law became effective January 1, 1989, lengthening the period -- from five to ten years -- within which prior offenses of driving under the influence were statutorily available to count against an offender for purposes of enhancing punishment for a new offense. Those offenders affected by the

lengthened period of the new legislation would appear to have been disadvantaged. However, the new law did not apply retrospectively. The new law was applied solely to events that occurred after its enactment and effective date of January 1, 1989.

Petitioners repeatedly claim that at the time of prior convictions, they were the beneficiaries of a promise that the prior convictions would be used for only five years to enhance punishment for any subsequent offense. This purported promise is without any statutory authority or any other basis in the record. The statutes identify a period of years to determine the number of prior offenses for the sole purpose of punishing the current offense. No statute made any promise concerning the disposition or punishment of any future -- uncommitted -- offense.

Petitioners' reliance upon Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) is misplaced. Fender v. Thompson supports Respondent's position and was cited by the Supreme Court of South Carolina in State v. Dabney, et al., 391 S.E.2d at 564. In Fender v. Thompson, the Virginia legislature enacted a statute eliminating parole eligibility for prison escapees who had been sentenced to life imprisonment.[1] In the present case, Petitioners are complaining about sentence enhancement for a new offense committed after the effective date of the new recidivist statute. Nothing in the new recidivist statute affected the punishment

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[1]A prisoner on parole continues to serve his sentence outside of the prison walls and remains in legal custody. Sanders v. MacDougall, 244 S.C. 160, 163, 135 S.E.2d 836 (1964). "[C]onditions of parole eligibility are part of the punishment of a crime." Schwartz v. Muncy, 834 F.2d 396 and n.7 (4th Cir. 1987), citing Warden v. Marrero, 417 U.S. 653, 661-664 (1974).

of other offenses committed before the effective date of the new statute.

Petitioners cannot demonstrate an offense of driving under the influence committed prior to January 1, 1989, that is now the subject of punishment under the new statute. No penalty for any earlier offense was increased. Only an offense subsequent to the effective date of the new law was subject to increased punishment, and there was no violation of the ex post facto prohibition.

> A law which imposes additional punishment to that prescribed at the time the offense was committed is prohibited under the ex post facto clauses of the United States and South Carolina Constitutions. U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4; Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). However, it is not a violation

> of the ex post facto clause for the legislature to enhance punishment for an offense based on a prior conviction of the defendant, even though the enhancement provision was not in effect at the time of the previous offense. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1947); McDonald v. Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542 (1900); cf. Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) and Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987) (violation of ex post facto clause to affect parole eligibility existing at time of conviction).

State v. Dabney, et al., ____S.C.____, 391 S.E.2d 563 (1990).

S.C. Code Ann. § 56-5-2940 (Supp. 1989) enhances punishment for recidivist driving under the influence offenders. Its punishment is only for new crimes after its effective date of January 1, 1989. An amended enhancement statute that punishes

only new crime is not ex post facto since it only allows convictions before its amendment to be used in assessing the penalty for a new offense -- subsequent to the effective date of the amended statute -- and does not increase punishment for prior convictions. Petitioners were sentenced for offenses of driving under the influence committed after the effective date of the amended statute. Petitioners' conduct in committing their offenses resulted in the application of the current statute for their punishment. "[T]he amendment of § 56-5-2940 simply lengthened the period of time previous convictions can be used to increase the punishment for a subsequent offense. ...[T]he statute does not violate the ex post facto clause." Id.

The Petition should be denied. The record does not support Petitioners' contention that any driving under the influence recidivist statute made them a

promise concerning the disposition or punishment of any future -- uncommitted -- offense. The new law was applied solely to punish driving under the influence offenses that occurred after the statute's effective date of June 1, 1989. The Supreme Court of South Carolina correctly determined that the ex post facto clause allows enhanced punishment for a repeated offense -- based upon prior offense(s) -- although the prior offense(s) took place when the enhancement provision was not in effect. The case was correctly decided and is consistent with public policy and the Court's prior decisions.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Ray Dabney, Appellant.

AND

The State, Respondent,

v.

Ronald Eugene Black, Appellant.

AND

The State, Respondent,

v.

Donald S. Jamison, Appellant.

AND

The State, Respondent,

v.

Kenton Thomas Hall, Jeffrey Dean Gregg, Robert Lewis Gilchrist, Bobby O'Neal Holder, and Dean Mitchell Malone, Appellants.

AND

The State, Respondent,

v.

Edward Higgins, Appellant.

Appeals From
York, Greenwood & Union Counties
James E. Moore, and
Robert L. McFadden, Judges

STATE v. DABNEY, et al.

Opinion No. 23195
Heard March 5, 1990 - Filed April 16, 1990

AFFIRMED

Thomas A. McKinney, of Rock Hill, for appellant James Ray Dabney; William E. Whitney, Jr., of Union, for appellant Ronald Eugene Black; C. Rauch Wise, Marvin R. Watson, and Billy J. Garrett, Jr., of Greenwood, for appellants Kenton Thomas Hall, Jeffrey Dean Gregg, Robert Lewis Gilchrist, Bobby O'Neal Holder and Dean Mitchell Malone; Melvin A. Robert, of York, for appellant Donald S. Jamison; Assistant Appellate Defender Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for appellant Edward Higgins.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Norman Mark Rapoport, all of Columbia; and Solicitors Larry F. Grant, of York and W. Townes Jones, IV, of Greenwood, for respondent.

PER CURIAM: Appellants pled guilty to or were convicted of driving under the influence (DUI). All had previous DUI convictions that they assert were erroneously used in calculating the level of the present offenses. We affirm.

South Carolina Code Ann. § 56-5-2940 (Supp. 1989) establishes the penalty for first offense DUI and for subsequent offenses, and provides the method for

determining what previous offenses shall be included in calculating the appropriate penalty. Prior to May 21, 1981, the time period for consideration of previous offenses was ten (10) years. On May 21, 1981, the time period was reduced to five (5) years. Effective January 1, 1989, the time period was again increased to ten (10) years.

Appellants committed the present offenses after January 1, 1989. They were sentenced under the amended statute and received enhanced punishment based on their prior DUIs which were committed more than five (5) years but less than ten (10) years before the commission of the present offense. Appellants assert the application of § 56-5-2940 to their cases is unconstitutional as a violation of the ex post facto clause. We disagree.

A law which imposes additional punishment to that prescribed at the time the offense was committed is prohibited under the ex post facto clauses of the United States and South Carolina Constitutions. U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4; Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). However, it is not a violation of the ex post facto clause for the legislature to enhance punishment for an offense based on a prior conviction of the defendant, even though the enhancement provision was not in effect at the time of the previous offense. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1947); McDonald v. Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542 (1900); cf. Fender v. Thompson, 883 F.2d 303 (4th

Cir. 1989) and Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987) (violation of ex post facto clause to affect parole eligibility existing at time of conviction).

In these cases, the amendment of § 56-5-2940 simply lengthened the period of time previous convictions can be used to increase the punishment for a subsequent offense. Appellants committed the offenses they were sentenced for after the effective date of the statute's amendment and it was their conduct in committing these offenses that triggered the recidivist feature of § 56-5-2940. We hold the statute does not violate the ex post facto clause. See Hinson v. Coulter, 723 P.2d 655 (Ariz. 1986).

Accordingly, appellants' convictions and sentences are affirmed.

AFFIRMED.

/s C.J.

/s A.J.

/s A.J.

/s A.J.

/s A.J.